Supreme Court, U.S.
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No. 90-1104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

N.A.A.C.P., DETROIT BRANCH; THE GUARDIANS, INC. BRADY BRUENTON; CYNTHIA MARTIN; HILTON NAPOLEON; SHARRON RANDOLPH; BETTY T. ROLLAND; GRANT BATTLE; CYNTHIA CHEATOM; EVIN FOBBS; JOHN H. HAWKINS; HELEN POELNITZ, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

DETROIT POLICE OFFICERS ASSOCIATION (DPOA); DAVID WATROBA, PRESIDENT; CITY OF DETROIT; COLEMAN A. YOUNG, MAYOR; DETROIT POLICE DEPT.; BOARD OF POLICE COMMISSIONERS; WILLIAM HART, CHIEF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS DPOA AND DAVID WATROBA IN OPPOSITION

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February 8, 1991

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals correctly held that Petitioners are not "prevailing parties" and are therefore not entitled to attorney fees under 42 U.S.C. §1988, as Petitioners' action challenging layoffs by the Detroit Police Department was without merit and was remanded by the Court of Appeals with instructions to dismiss.

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PRELIMINARY STATEMENT

Respondents DPOA and David Watroba, President (hereinafter collectively referred to as "Respondent DPOA"), submit this brief in opposition to the petition for writ of certiorari. Respondents City of Detroit, Coleman A. Young, Detroit Police Dept., Board of Police Commissioners, and William Hart (collectively referred to as "the City") are separately represented, and Respondent DPOA incorporates by reference the arguments of the City in opposition to the petition for writ of certiorari.

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COUNTER-STATEMENT OF CASE

The individual Petitioners represent a class of police officers employed by the City of Detroit (hereinafter the "City"). They joined as Plaintiffs in this action with Petitioners' N.A.A.C.P. and The Guardians, Inc. (hereinafter the "Petitioners") against the City and Respondent DPOA alleging that certain layoffs of police officers in 1979 and 1980 violated Petitioners' rights under the Equal Protection Clause of the Fourteenth Amendment, 42

U.S.C. §1981, 42 U.S.C. §1983, and 42 U.S.C. §1985(3). The layoffs were made pursuant to a bona fide seniority plan collectively bargained for by Respondent DPOA and the City.

Each claim of Petitioners against Respondent DPOA has been dismissed. This Court has declined review of the Court of Appeals' decision that Petitioners' "theory of liability is without merit," as §703(h) of Title VII of Civil Rights Act of 1964, as set forth in 42 U.S.C. §2000e-2(h), exempts a bona fide seniority plan from attack. *N.A.A.C.P. v. D.P.O.A.*, 900 F.2d 903 (6th Cir. 1990), page A-176, 183-193; *cert. denied* No. 90-596, _____ U.S. _____, 111 S. Ct. 514 (November 26, 1990).[1,2]

Despite Petitioners' failure to ultimately prevail on the merits, they continue to claim an entitlement to attorney fees under 42 U.S.C. §1988. In denying Petitioners' request for fees, the Court of Appeals held:

> The injunctive decrees of the district court to the contrary were reversed on appeal. Thus the plaintiffs did not 'cross the statutory threshold' or meet the 'absolute limitation' required for prevailing party status on such theory, claim or decree reviewed on appeal.[3]

With regard to Petitioners' claim that they are "prevailing parties" because their actions were a "catalyst" of legal change, the Court held that there was no new legal right created by the Plaintiffs in this matter. The Court stated:

> Consequently, plaintiffs may not be characterized as 'prevailing parties.' Plaintiffs are not entitled to prevailing party status simply because they have presented an interesting argument or difficult case. It must prevail on some significant claim or legal theory.[4]

The Court of Appeals also noted in its opinion that it did not

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[1] Page references are to Petitioners' Appendix to Petition for Writ of Certiorari.

[2] Petitioners have petitioned for reconsideration of this Court's decision to deny the Petition for Writ of Certiorari.

[3] *N.A.A.C.P. v. D.P.O.A.*, 914 F.2d 1494 (6th Cir. 1990), page A-200, 201.

[4] *Id*, page A-202.

have before it the question of Plaintiffs' right, if any, to attorney fees for services performed to obtain interim injunctive relief or protective orders which maintained the status quo. Petitioners did not apply to the District Court for such fees under §1988.

The Petition for Writ Certiorari was submitted by Petitioners asking this Court to review the Court of Appeals' opinion that Petitioners are not "prevailing parties" in this litigation and thus are not entitled to attorney fees under 42 U.S.C. §1988. Petitioners contend they are "prevailing parties" because they accomplished the recall to employment of all laid off officers pursuant to the District Court's pretrial rulings. Petitioners ignore that these pretrial rulings were erroneous, and ultimately their case was found to have no merit. Petitioners are not "prevailing parties" and therefore are not entitled to attorney fees, for the reason that they failed to state a viable claim against Respondents and ultimately their Complaint was dismissed. Respondent DPOA contends that none of the reasons for granting the writ urged by Petitioners provides a basis for granting review.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

The asserted conflict among the Courts of Appeals is nonexistent

In support of this reason for denying the Petition, Respondent DPOA relies upon and incorporates herein the argument set forth by the City in its Brief in Opposition to granting the writ.

II.

The Courts of Appeals have consistently held that parties who have ultimately lost on the merits are not entitled to fees notwithstanding that relief gained under interim orders may as a practical matter survive

In support of this reason for denying the Petition, Respondent DPOA relies upon and incorporates herein the argument set forth by the City in its Brief in Opposition to granting the writ.

III.

The District Court and Court of Appeals were correct in finding that Petitioners were not prevailing parties against Respondent DPOA

The arguments contained in Respondent City's Brief in Opposition to the Petition for Writ of Certiorari apply to Respondent DPOA. Additionally, it must be noted that Petitioners have incorrectly represented the relief they allegedly obtained against Respondent DPOA.

As to Respondent DPOA, the primary issue is whether the bona fide seniority plan relating to layoffs of Detroit Police Officers is exempt from attack under the Constitution and the Civil Rights Act of 1964. Petitioners did not prevail on this issue. Their Complaint was found to have no merit by the Court of Appeals. The number of black officers who hold leadership positions in the DPOA reflects the democratic process in which the union conducts its elections, and not the result of litigation brought by Petitioners. Petitioners' claim that black officers held more leadership positions in the union "*after and as a direct result of* this lawsuit" is unfounded. Petitioners have not prevailed on any significant issue in this litigation, and their lawsuit has not brought about any benefit under the test of whether a civil rights plaintiff is a prevailing party as stated in *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983); and *Texas State Teachers v. Garland Independent School Dist.*, 489 U.S. 782, 791 (1989), quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-279 (1st Cir. 1978). Petitioners are not prevailing parties and are not entitled to fees.

CONCLUSION

The Petition for Writ of Certiorari should be denied as the Sixth Circuit Court of Appeals correctly determined that Petitioners are not prevailing parties under 42 U.S.C. §1988, and therefore are not entitled to attorney fees.

Respectfully submitted,

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